

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LONNIE SIE CHANCE,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2010-1123

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 28 2011

SUMMARY OPINION

C. JOHNSON, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant, Lonnie Sie Chance, was convicted after jury trial in Garfield County District Court, Case No. CF-2010-207, of First Degree Burglary, After Former Conviction of Two or More Felonies (Count I) and Unlawful Possession of Drug Paraphernalia (Count II). The jury assessed punishment at thirty years imprisonment on Count I, and one year in the county jail on Count II.¹ The trial court sentenced Appellant accordingly ordering the sentences be served concurrently. It is from this Judgment and Sentence that Appellant appeals to this Court.

Appellant raises the following propositions of error:

1. Improper prosecutorial argument and evidence concerning probation and parole combined to deprive Appellant of his right to a fair jury sentencing trial under the 5th, 6th and 14th Amendments to the United States Constitution and Art. II, §§ 7 and 20 of the Oklahoma Constitution.
2. On Count II, through improper procedure, instructions and verdict forms, the trial court committed plain error depriving Appellant of his rights to a fair jury sentencing under the 5th, 6th and 14th Amendments to the United States Constitution and Art. II, §§ 7 and 20 of the Oklahoma

¹ Appellant must serve 85% of the sentence imposed for First Degree Burglary under 21 O.S.Supp.2009, § 13.1.

Constitution.

3. The trial court abused its discretion by imposing restitution without following the mandatory statutory procedure governing restitution orders, in violation of Appellant's due process rights under the 14th Amendments to the United States Constitution and Art. II, § 7 of the Oklahoma Constitution.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Mr. Chance's Judgment and modify his Sentence. As to Proposition I, we find that the Judgments and Sentences and 'pen packet' introduced contained unmistakable improper references to the pardon and parole system which were exacerbated by the prosecutor's argument to the jury that this information could be used to determine sentencing. This error was plain error resulting in prejudice to Appellant. Accordingly, we modify Appellant's sentence on Count I from thirty years imprisonment to twenty years imprisonment. See *Hunter v. State*, 2009 OK CR 17, ¶ 8, 208 P.3d 931, 933; *Darks v. State*, 1998 OK CR 15, ¶ 59, 954 P.2d 152, 167.

Appellant complains in his second proposition that error occurred when the misdemeanor offense of Unlawful Possession of Drug Paraphernalia charged against him in Count II was tried in a bifurcated proceeding despite the fact that it was not subject to enhancement. He also complains that error occurred when the jury was erroneously instructed by the trial court that, "The punishment for Unlawful Possession of Drug Paraphernalia after three previous convictions is imprisonment in the county jail for one year or a fine of \$1000 or both." The State concedes that the misdemeanor crime of Unlawful Possession

of Drug Paraphernalia was not subject to enhancement under either the general enhancement provisions of 21 O.S.Supp.2002, § 51.1 or the specific enhancement provisions of 63 O.S.Supp.2004, § 2-405. The State also concedes that the crime of Unlawful Possession of Drug Paraphernalia should not have been tried in a bifurcated proceeding. However, because defense counsel objected to neither the instructions regarding the range of punishment nor the trial of the paraphernalia charge in a bifurcated proceeding, the State asserts that this Court may review for plain error and argues that these errors did not rise to the level of plain error. See *Marshall v. State*, 2010 OK CR 8, ¶ 56, 232 P.3d 467, 480; *McIntosh v. State*, 2010 OK CR 17, ¶¶ 9, 10, 237 P.3d 800, 803. In this case, the jury instruction not only misstated the range of punishment but failed to allow the jury to impose any jail time less than the maximum allowed. This was plain error that was not harmless. Accordingly, Appellant's sentence of one year in jail for Unlawful Possession of Drug Paraphernalia is modified to thirty days in the county jail.

Finally, Appellant asserts that the trial court abused its discretion in assessing restitution without holding a hearing to determine, to a reasonable certainty, that the amount of restitution requested was the actual amount of the victim's loss as is required by 22 O.S.2001, § 991a and 22 O.S.2001, § 991f. The record supports this argument and the State agrees, conceding that the district court's restitution order must be vacated and new proceedings conducted to determine a proper restitution amount. See *Logsdon v. State*, 2010 OK CR 7, ¶¶ 8-13, 231 P.3d 1156, 1162.

DECISION

The judgment of the district court is **AFFIRMED**. However, the sentence imposed on Count I is **MODIFIED** from thirty years imprisonment to twenty years imprisonment and the sentence imposed on Count II is **MODIFIED** from one year in the county jail to thirty days in the county jail. Further, the case is **REMANDED** to the district court for a hearing to determine the proper restitution amount as is required by 22 O.S.2001, § 991a and 22 O.S.2001, § 991f. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY
THE HONORABLE RONALD G. FRANKLIN, DISTRICT JUDGE**

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OPINION BY C. JOHNSON, J.

A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
SMITH, J.: CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

While I agree with the Court's decision to affirm the judgments of guilt in each of these offenses, and the modification of the sentence as to the misdemeanor offense in Count II, I cannot agree to the modification of sentence in Count I.

There is absolutely no evidence the sentence in Count I was decided based on passion, prejudice or any outside influence. In fact, while the maximum possible sentence was life in prison, the jury only sentenced Appellant to 30 years on Count I, a sentence that is only 10 years above the minimum sentence allowed based on Appellant's prior convictions. This record reveals no prejudice was present due to the error. When no actual prejudice can be shown, it should not be presumed. In this case the Appellant did not object either to the evidence or the argument, thus he has waived all error unless plain error is shown. *Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 695. Even if plain error is found, the record must be reviewed to determine if prejudice is shown. *Id.*, 1994 OK CR 40, ¶ 30, 876 P.2d at 700. *See also Smallwood v. State*, 1995 OK CR 60, ¶ 29, 907 P.2d 217, 227 (“[t]his Court has consistently held that it is not error alone that reverses the lower court's judgments, but error plus injury, and the burden is upon the appellant to establish the fact that he was prejudiced in his substantial rights by the commission of the alleged error”). This record reveals no evidence of prejudice as to the allegations in Proposition I. The jury sentence should be affirmed.